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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 599

McCORMICK & COMPANY, INC., a corporation, and DURHAM BROS., INC., a corporation,
Appellants,

v.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, and HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA,
Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL ON BEHALF OF APPELLANTS.

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.

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STATEMENT AS TO JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. §345) provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections, and not otherwise:
>
> * * * *
>
> "(3) Section 380 of this title."

Section 380 of the Act, referred to in the foregoing section, provides as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges and unless a majority of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the

final hearing of such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 3rd of December, 1931. (R. 62).

The application for appeal was presented on the 21st day of December, 1931. (R. 73).

(NOTE: All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the United States District Court for the Southern District of West Virginia and on file with the Clerk of this Court. The record has not yet been printed.)

C.

Nature of Case and Rulings Below.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by McCormick & Company, Inc., and Durham Brothers Company, Inc., who sue on behalf of themselves and certain other non-resident manufacturers and wholesale dealers in products used exclusively for medicinal, mechanical, toilet and culinary purposes, containing ethyl alcohol as a necessary solvent and preservative, against the appellees, W. G. Brown, Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia. (R. 2).

In this suit, the appellants, who hold permits, issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition, to manufacture and sell products containing ethyl alcohol, seek to restrain the appellees from requiring appellants to obtain permits from the State Prohibition Commissioner, and pay therefor an annual license fee, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell said products, and to enjoin the appellees from instituting actions to prevent or interfere with the sale of said products by appellants. (R. 9).

The defendant State Prohibition Commissioner bases his right to require said permits upon certain rules and regulations published and established by him, as such

State Prohibition Commissioner, and enforced by him and the defendant Attorney General under the alleged authority of Chapter 60 of the Official Code of West Virginia. (6, 27).

It is the contention of the appellants that the action of the State Prohibition Commissioner, in requiring them to secure said permits and pay an annual license fee therefor, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia, who are authorized by the State Prohibition Commissioner to receive, store and sell the same, constitutes an unlawful interference with interstate commerce, and violates the Commerce Clause of the Constitution of the United States. (R. 3).

The Judge of the District Court, in which the suit was pending, convened a three-judge court under §266 of the Judicial Code, as amended. (28 U. S. C. A. §380). This Court, upon hearing of the cause, held that the action of the defendant State Prohibition Commissioner in requiring said permits, was constitutional, denied an interlocutory and permanent injunction, and dismissed this suit. (R. 40, 62).

D.

Cases Believed to Sustain Jurisdiction.

1. Jurisdictional amount.

Southern Express Co. v. *Mayor etc., of Ensley*, 116 Fed. 756;
City of Hutchison v. *Beckham*, 118 Fed. 399;
Jewel Tea Co. v. *Lee's Summit, Mo.*, 198 Fed. 532;
Humes v. *City of Little Rock*, 138 Fed. 929;
Campbell Baking Co. v. *City of Maryville*, 31 Fed. (2d) 466;
Bitterman v. *Louisville & Nashville R. Co.*, 207 U. S. 205, 225, 52 L. Ed. 17.

2. Supreme Court Jurisdiction.

McCormick & Co. v. *Brown*, 52 Fed. (2d) 934;
Stratton v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135;
Bowman v. *Chicago etc. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 799;
Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128;
Adams Express Co. v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267;
Gerber v. *Shoenfeld*, 43 Fed. (2d) 255;
New Jersey Bell Tel. Co. v. *State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338, 74 L. Ed. 463;
Sprout v. *South Bend*, 277 U. S. 115, 72 L. Ed. 833.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of §§238 and 266 of the Judicial Code as amended. (28 U. S. C. A. §§ 345 and 380.)

Respectfully submitted,

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.